International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada; International Sound Technicians of the Motion Picture, Broadcast, and Amusement Industries, Local 695 *and* **Twentieth Century-Fox Film Corporation.** Case 31-CB-3563

April 30, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 3, 1981, Administrative Law Judge Clifford H. Anderson issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondents filed exceptions and briefs in support thereof, Respondents filed a brief in support of the Administrative Law Judge's Decision, and the Charging Party filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] Because we adopt the Administrative Law Judge's recommended Order, we find it unnecessary to pass upon the conditional findings and conclusions in sec. III,B,3 and the last sentence of sec. III,B,4 of his Decision.

Member Fanning notes that, although he dissented in two cases cited by the Administrative Law Judge, *Auto Warehousers, Inc.*, 227 NLRB 628 (1976), enforcement denied 571 F.2d 860 (5th Cir. 1978); *Bricklayers and Stone Masons Union, Local No. 2, Bricklayers, Masons and Plasterers' International Union of America, AFL-CIO (Gunnar I. Johnson & Son, Inc.)*, 224 NLRB 1021 (1976), enfd. 562 F.2d 775 (D.C.Cir 1977), his dissents were unrelated to the proposition for which the Administrative Law Judge cites these cases.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: This case was heard before me on December 1, 2, and 3, 1980, in Los Angeles, California, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 31 of the National Labor Relations Board on July 25, 1980, which was based upon a charge filed by Twentieth Century-Fox Film Corporation (the Charging Party), on January 9, 1980, and amended on July 9, 1980, against International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Respondent International) and International Sound Technicians of the Motion Picture, Broadcast, and Amusement Industries, Local 695 (Respondent Local 695 and, collectively with Respondent International, Respondents).

The complaint, as amended, alleges that Respondents by seeking the enforcement of certain provisions of a collective-bargaining agreement by means of an arbitrator's award, have violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by attempting to cause the Charging Party to give improper employment preference to a former union official. Respondents deny that they have in any way violated the Act. They assert, *inter alia*, that the charge and complaint are time-barred pursuant to Section 10(b) of the Act, that no preference in the legal sense has been sought for former officials and that, assuming preference is found to have been given, that such preference is not illegal, but is a legitimate preference for Respondents' officials necessary to insure that qualified individuals accept positions with Respondents.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence,[1] to examine and cross-examine witnesses, to argue orally and to file post-hearing briefs and proposed findings of fact and conclusions of law.

Upon the entire record herein, including helpful post-hearing briefs filed by the General Counsel, the Charging Party, and a joint brief and proposed findings of the facts and conclusions of law from Respondents, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Charging Party is now, and has been at all times material herein, a California state corporation engaged at Los Angeles, California, in the production and sale of motion pictures. The Charging Party, in the course and conduct of its business operation, annually enjoys gross revenues in excess of $500,000 and sells and ships goods and services valued in excess of $50,000 directly to customers located outside the State of California.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent Local 695 and Respondent International, and each of them, are and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

[1] See finding of facts, sec. IV,B,3, *infra*, for a discussion of certain rejected evidence.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Events*

1. General background

At all times material, a group of employers engaged in the motion and still picture industry (Producers) have, on a multiemployer basis, negotiated, executed, and administered a series of multiemployer collective-bargaining agreements with Respondent International covering the rates of pay, hours of employment and other terms and conditions of employment of certain employees of the Producers. There is no question, and I find, that the multiemployer unit is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act. One of the series of agreements described above was effective by its terms from February 1, 1976, through July 31, 1979 (Basic Agreement).

A separate series of agreements between the Producers and Respondents has been negotiated covering rates of pay, hours of employment, and other terms and conditions of employment of employees of the Producers working in particular crafts or subdivisions of the larger unit described above. One of this series of agreements is an agreement covering employees in sound technician job classifications within the jurisdiction of Respondent Local 695. The Producers and Respondents signed such an agreement effective from February 1, 1976, through July 31, 1979 (Local Agreement). On or about August 1, 1979, the Producers and Respondents entered into a new agreement covering sound technician job classifications (Local Memorandum Agreement, and collectively with the Local Agreement referred to as the Local Contracts and collectively with both the Local Agreement and the Basic Agreement as the contracts).[2]

2. Contractual language

At all relevant times, the Local Contractors have contained the following provisions. Article 76 states:

> 76. *Re-employment of Former Labor Union Officers*—Any employee who has been employed by the Producer for the twelve (12) consecutive months (and has actually received pay for two hundred or more days in that period) immediately prior to the date of his election or appointment to a paid full-time job with a labor organization in the motion picture industry shall be re-employed in his former job within ninety (90) days after leaving his Union position, on the same basis and seniority as though he had never left such job with Producer. Provided, however, that such job is available at the time of request for re-employment; that the job is not then held by an employee holding a personal service contract; that the employee in the opinion of the Producer is qualified and able to perform the duties required in such job, and that such employee had made application within thirty (30) days of leaving his Union position.
>
> If such position has been abolished or the labor requirements of the Producer have materially changed, then, subject to the above conditions, the Producer will give such employee preference of employment for any job available, within the classifications of the bargaining unit.

Article 68 *in part* creates industry experience rosters wherein employees are divided into three groups by their relative experience in the industry, industry group one being more senior than industry group two, etc. An employer must hire and rehire employees giving preference to the more senior group and must lay off in reverse order. There is no contractual obligation to bump or replace an employee who is in a lower industry group when employees in higher groups are unemployed. The Local Contracts by their terms do not specifically provide for individual studio seniority for sound technician employees.[3]

Article 63(f) provides:

> Absences
>
> For the purposes of this paragraph 68, an employee who has been employed in any of the job classifications covered by this agreement, shall not be removed from the Industry Roster for any of the following:
>
> (1) Absence because of illness not exceeding one year;
>
> (2) Absence because of military service;
>
> (3) Absence because of service (in the same line of occupation pursued by the employees in the Motion Picture Industry for the United States Government) on any research projects for the defense of the United States; provided such employees [sic] was expressly recruited by authorized government representative or such service.
>
> (4) Employment in a paid full time job in Los Angeles County, California, by the I.A.T.S.E. or a Local Union of the I.A.T.S.E. subject to the Producer-I.A.T.S.E. and M.P.M. Basic Agreement.
>
> (5) Employment by the Producer as a supervisor where the employee has had previous work and experience in the Motion Picture Industry in the job classifications covered by this agreement.
>
> As above provided, the burden of proving the above absences from services with Producer shall be on the employee.

Article 67 states:

> A regular employee's request for a leave of absence, not to exceed six months, will be given consideration by the Producer, and Producer will not unreasonably refuse to grant such a leave of absence for good cause, provided the employee's service can

[2] See *International Sound Technicians Local 695 (Twentieth Century Fox)*, 234 NLRB 811 (1978), for a discussion of the relationship between Respondent Local 695, Respondent International and the contracts governing employees in the units.

[3] Whether or not practice involved industrywide or individual studio seniority will be discussed *infra*.

be reasonably spared. All such leaves of absence will be in writing. No such leave of absence will be extended beyond six months, except for compelling reasons.

Article 71 provides:

Recognizing the moral and legal responsibility to the employees subject to this agreement who have entered into the Armed Services, the Producer and the Union agree that they have a joint responsibility (subject to the then-existing statutes)[4] in the reinstatement of such employees to the job such employees held prior to their entry into the Armed Service.

Producers and the Union agree that employees temporarily holding such jobs will be displaced by such returning employees.

3. The events concerning Coffey

Mr. John L. Coffey was employed by the Charging Party as a Y-9 sound recorder from 1965 until 1969. By 1969 he was in the industry group one experience category.

In 1969 Coffey ran for the office of business representative of Respondent Local 695. Coffey was elected and left the Charging Party's employ. As business representative for Respondent Local 695, Coffey was responsible on behalf of Respondent Local 695 for the administration of its collective-bargaining agreements, including the handling of grievances and arbitration. Coffey was elected to successive 3-year terms of office in 1969, 1972, and 1975.

In 1977 Coffey was suspended from his position with Respondent Local 695. Coffey thereafter sought but was denied reemployment with the Charging Party. He filed a grievance concerning this denial of employment. The matter went to arbitration and the arbitrator ultimately denied the grievance on the procedural ground that Coffey's application to the Charging Party for reemployment had not been made consistent with contractual requirements of article 76. Coffey was subsequently reinstated to his business representative position with Respondent Local 695.

On November 25, 1977, Coffey was again suspended from union membership and removed from office.[5] On or about December 8, 1977, Coffey applied for reemployment with the Charging Party. The Charging Party refused to employ him. On or about March 13, 1978, a grievance was filed seeking Coffey's reinstatement pursuant to article 76 of the Local Agreement. On January 30, 1979, an arbitration was held before Arbitrator Howard S. Block. Block's Opinion and Award, issued on October 2, 1979, found that the Charging Party had improperly denied Coffey the rights accorded him under article 76. The arbitrator ordered the Charging Party to reinstate Coffey and to make him whole. On October 19, 1979, and November 1, 1979, Arbitrator Block and the Charging Party exchanged correspondence regarding the details of complying with the arbitrator's order. The Charging Party has refused to abide by the award to date. On January 9, 1980, the instant charge was filed.

B. *Analysis and Conclusions*

1. The timeliness issue

The threshold issue litigated by the parties and argues on brief was the question of whether or not the General Counsel's complaint was barred by operation of the time limitation set forth in Section 10(b) of the Act. Respondents correctly note that the signing of the collective-bargaining agreements, Coffey's application for reemployment with the Charging Party, and subsequent actions related to the filing of the grievance all occurred more than 6 months before the filing and service of the instant charge. The arbitrator's award, however, issued within the 6-month period preceding the filing of the charge. The issue thus raised by the parties is whether or not the arbitrator's award requiring the Charging Party to reinstate Coffey with backpay pursuant to the arbitrator's interpretation of article 76 is an action sufficient to place the events within the reach of the charge and the complaint.

Where a contract with an allegedly illegal clause has been in existence for longer than the 6-month period preceding the filing of a charge, the Board has held that an interpretation or application of the contested contractual provisions by means of an arbitrator's arbitral award is a reaffirmation, renewal of reassertion of the contract and is an operative event which is susceptible to challenge within 6 months of is occurance. *Joint Council of Teamsters No. 42, and General Teamsters, Chauffeurs, Warehousemen & Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Inland Concrete Enterprises, Inc.)*, 225 NLRB 209 (1976); *Bricklayers and Stonemasons Union, Local No. 2 Bricklayers, Masons, and Plasterers' International Union of America, AFL–CIO (Gunner I. Johnson & Son, Inc.)*, 224 NLRB 1021 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977).

All parties have cited to me the decisions of the Board and the United States Court of Appeals for the Fifth Circuit in *Auto Warehousers, Inc.*, 227 NLRB 628 (1976), enforcement denied 571 F.2d 860 (5th Cir. 1978). As Respondents note, the court rejected the Board's position that a subsequent assertion of a contract right was an independent attempt to enforce the collective-bargaining agreement. The General Counsel and the Charging Party argue that the Board in *Actors' Equity Association*, 247 NLRB 1192 (1980), did not acquiesce in the court's decision reversing the Board in *Auto Warehousers*. It is well established that an administrative law judge must follow the Board's interpretation of the Act even where the

[4] Certain Federal laws provide for veteran re-employment. See, e.g., Vietnam Era Veteran's Readjustment Assistance Act of 1974, 38 U.S.C. § 2001, *et seq.*, 88 Stat. 1592; cf. *Fishgold* v. *Sullivan Drydock and Repair Corp., et al.*, 328 U.S. 275 (1946).

[5] Coffey, Respondent Local 695, Respondent International, the Producers and the Charging Party were all involved, to a greater or lesser degree, in a disagreement concerning certain work and the technological and manning implications of that work. Coffey, without my consideration of the merits of the various disagreements, took positions with which others from time to time disagreed. During this period Coffey's relationship to the other parties as a result of these disagreements may be characterized as contentious, litigious, adversarial, and disputative.

courts of appeals disagree. Thus, even assuming the court of appeals' decision in *Auto Warehousers* would require a different result were it to control this case—a question I do not reach—I find the Board currently holds that the attempted enforcement of a contract by means of an arbitrator's award issuing within the 10(b) period is sufficient to bring the matter to issue. I further find that I am bound by that Board holding.

Accordingly, for the reasons stated, I find that the arbitrator's award issued within the 6-month period preceding the filing and service of the charge herein. This act is sufficient to bring the interpretation of the contract language and its legality into issue before me.[6]

2. Does article 76, as applied by the arbitrator in the Coffey case, grant a preference to former union officials?

The Board has determined in *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), enfd. *sub nom. N.L.R.B.* v. *Milk Drivers & Dairy Employees, Local 338, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 531 F.2d 1162 (2d Cir. 1976), and subsequent cases, that contracts which provide for superseniority for union stewards violate the Act under certain circumstances. The cases establish rebuttable presumptions and burdens and set forth a detailed means of analysis to determine if such preferences may be justified. The threshold issue here is whether or not and to what extent the contract clause herein as applied by the arbitrator is such a preference clause. Only if it qualifies as a preference clause is it appropriate to reach Respondent's asserted justification for the clause language.

The clause in question, as applied by the arbitrator, given compliance with certain procedural requirements, entitles a former union official to claim his former employment with his former employer "as though he had never left such job." The arbitrator also held that the right to bump or replace less senior employees is also conferred on former union officials by article 76. Such an entitlement is a contract right not shared by other employees. Much like the partially filled glass which is perceived as half empty or half full, the effects of article 76 depend on the viewer's perspective. The Charging Party and the General Counsel emphasize the advantage or preference of the article in giving to the former union official as a matter of right something no other employee receives. Respondents seek to characterize the article as but a leave of absence clause. They emphasize that the former union official gains nothing which he would not have had if he had not left his previous unit employment. Thus they argue it may hardly be characterized as a preference.

I find that the language in question does not give to former union officials the type of preference contained in the contractual superseniority clauses analyzed in *Dairylea* and its progeny. The superseniority discussed in those cases is an advantage a union steward or other union official gains over other employees by virtue of holding the union position. The superseniority gives the preferred employees a specific advantage over more senior employees. The Board's theory of a violation in those cases is that such a preference encourages employees to be good unionists in order to obtain a union position so that they will obtain the preference. Thus the good unionist gains employment advantage over his more senior colleagues. It is hard to imagine that an employee would consider the instant contractual entitlement to be restored to his former unit position after leaving union employment a preference or advantage. I see no preference, but merely a restoration. After an employee becomes a union official and is thereafer restored to his former position, he is not better off than if he had never left his unit position in the first instance. Thus, under article 76, there is no incentive for a union employee to seek to become a union official because at the conclusion of such union service and upon return of his unit position, the employee has but the same seniority he would have accrued if he had never left.[7]

Accordingly, finding that neither the contract nor the arbitrator's award as to Coffey provide an improper preference to former union officials, I find that Respondents have not violated the Act as alleged. Therefore, I shall dismiss the complaint in its entirety.

3. A *Dairylea* analysis and Respondent's defenses

Respondents argued first that article 76 was not a preference clause and second, assuming *arguendo* a contrary finding, that the preference was justified. In agreement with Respondents, I have found article 76 does not give former union officials a preference which requires justification by Respondents. Accordingly, no further analysis is necessary. Reviewing authority, however, may differ regarding this threshold conclusion. In order to reduce the possible need for a remand with its attendant increased costs and delay, I shall make conditional findings and conclusions regarding Respondent's various affirmative defenses, assuming for the purpose of this section only that my previous finding is error and that the General Counsel has established a *prima facie* case that article 76 grants a significant and cognizable preference based on union service.

Respondents contend that the fact the relevant contract language is long standing argues for its validity. In my view legal justification is independent of mere vener-

[6] I also decline to defer to the arbitrator's award. The arbitrator expressly refused to decide the validity under the Act of the contractual language interpreted. Further, the Board does not defer to an arbitrator on such statutory issues. *Max Factor & Co.*, 239 NLRB 804 (1978), enfd. 640 F.2d 197 (9th Cir. 1980).

[7] Although not dependent upon it, my dertermination that the instant contractual provision does not rise to the level of a preference clause is supported by the Board's decision in *Brown & Williamson Tobacco Company*, 227 NLRB 2005 (1977). In that case the Board, reversing the Administrative Law Judge, found the maintenance and enforcement of a contractual leave of absence clause violated neither Sec. 8(a)(1), (2), and (3) nor Sec. 8(b)(1)(A) and (2) of the Act. The contract provided that former unit employees could retain and accrue seniority in the unit—with attendant bumping rights—if, and only if, they paid a fee to the union. If the retention and accrual of unit seniority and attendant bumping rights may be contractually awarded only to those individuals who pay the union a fee without violating Sec. 8(b)(1)(A) and (2) of the Act, I am presuaded that a similiar contractual entitlement to former union officials does not fall within the intendments of *Dairylea* and its progeny. Indeed, the dissent in *Brown & Williamson* cited *Dairylea* (227 NLRB at 2008, fn. 12).

ation. The Board rejects age as a relevant factor in determining contractual validity. *A.P.A. Transport Corp.*, 239 NLRB 1407, 1409, fn. 9 (1979).[8] Respondents also offered to prove that similar contract language is in wide or common usage. I rejected this evidentiary proffer because, if the clause be illegal or legal, the existence of similar contracts is irrelevant. If valid, the contract language will stand even if no other contract is similarly worded. If the contract is invalid, the existence of widespread, if unalleged and unlitigated, contract language does not require or support a different finding.[9] *Malus usus abolendus est.*

Respondents also argue that a preference to former union officials is necessary in their industry to insure continuity of effective union representation. The Board has specifically rejected such a justification where the contractual preferences applies to former union officials rather than on-the-job union contract administrators. *Pattern Makers' Association of Detroit and Vicinity (Michigan Pattern Manufacturers Association)*, 233 NLRB 430 (1977), enfd. 622 F.2d 267 (6th Cir. 1980). The *Pattern Makers'* case also specifically rejects Respondents' assertion that preference must be accorded to former officials to prevent or avoid potential discrimination by employers against active union agents.

Based upon all of the above, were I to have that article 76 contained a preference clause within the meaning of *Dairylea, supra*, I would also find that Respondents have failed to establish any justification or excuse for such a clause. Thus, I would find a violation of Section 8(b)(1)(A) and (2) of the Act.

[8] Consistent with this analysis, I have rejected any evidence offered by Respondents as to justification for the clause during previous contract terms. Evidence offered to justify the contract language must be applicable to the terms of the contracts in issue. That is, it must be supportive of a finding that such conditions or events are contemporaneous with the contract in question.

[9] The Board may, in applying its industrial relations expertise to a given case, consider broader context either through the exercise of judicial notice or otherwise. Record evidence is not a necessary predicate to such analysis and consideration.

4. Summary

I have found that the issuance of the arbitrator's decision within 6 months of the filing and service of the charge in the instant case timely places the allegations of the complaint before me. I have considered article 76 as interpreted and applied by the artbitrator and have found that it does not give improper advantage to Respondent's former officials. I specifically reject the General Counsel's argument that it is a superseniority or other improper clause within the meaning of the Board's *Dairylea* decision. I find therefore that Respondents have not violated the Act and I shall dismiss the complaint. Were I to have found article 76 to constitute a preference clause I would find it without justification and would have sustained the complaint allegations.

CONCLUSIONS OF LAW

1. The Charging Party is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondents, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondents, and each of them, have not violated the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

1. The complaint is dismissed in its entirety.

2. All motions inconsistent with the above are denied.

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.